Supreme Court, U.S.
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No. 09- 091021 FEB 23 2010

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IN THE
Supreme Court of the United States

GREG JOHN,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT,
a Political Subdivision of the State of Nevada;
TOM MORGAN, an Individual;
KATHERINE MILNER, an Individual,
GARY DIEDRICH, an Individual; and
MARTY SWISHER, an Individual,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the Nevada Supreme Court extending Nevada's anti-SLAPP statute to provide immunity from federal law causes of action pending in state court should stand where the application of the statute to those federal causes of action would undermine important federal interests protected by federal law as enunciated in this Court's jurisprudence and in that of the Circuit Courts of Appeal.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iii
TABLE OF CITED AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
PROCEDURAL HISTORY	1
SUMMARY OF ARGUMENT	2
REASONS FOR GRANTING THE PETITION	2
CONCLUSION	7

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of The State Of Nevada Filed November 25, 2009 ..... 1a

Appendix B — Order Of The In The Ninth Judicial District Court Of The State Of Nevada, In And For The County Of Douglas Filed July 21, 2006 ..... 28a

TABLE OF CITED AUTHORITIES

Page

Cases:

Ambus v. Granite Brd. Of Ed.,
995 F.2d 992 (10th Cir. 1993) 5

Board of Regents v. Tomanio,
446 U.S. 478, 100 S. Ct. 1790 (1980) 6

Felder v. Casey,
487 U.S. 131, 108 S.Ct. 2302 (1988) ..... *passim*

Goldberg v. Town of Rocky Hill,
973 F.2d 70 (2d Cir. 1992) 5

Howlett v. Rose,
496 U.S. 356 (1990) 4, 5, 6

Kimes v Stone,
84 F.3d 1121 (9th Cir. 1996) 5

Martinez v. California,
444 U.S. 277, 100 S.Ct. 553 (1980) 6

Owen v. City of Independence,
445 U.S. 622, 100 S.Ct. 1398 (1980) 6

U.S. v. Lockheed Missles & Space Co.,
190 F.3d 963 (9th Cir. 1999) 5

Webb v. Sloan,
330 F.3d 1158 (9th Cir. 2003) 5

Cited Authorities

Page

United States Constitution:

First Amendment 1

Statutes:

NRS § 41.650 3

NRS § 41.660 4

NRS § 41.660(4) 4

28 U.S.C. § 1257(a) 1

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 2000e-2 1

42 U.S.C. § 12101 et seq. 1

Rules:

Fed.R.Civ.P. 56(f) 4

SCR 10(b) 5

SCR 10(c) 5

OPINIONS BELOW

The reported decison of the Nevada Supreme Court, dated November 25, 2009 is set forth at Appendix A. The decision of the Ninth Judicial District Court is at Appendix B.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

PROCEDURAL HISTORY

This is a federal employment law case filed in state court. Appellant brought claims under Title VII (42 U.S.C. § 2000e-2), 42 U.S.C. § 1983 (First Amendment retaliation) and the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.).

Respondents asserted that employer's conduct that lead to the adverse employment actions was immune under Nevada's anti-SLAPP statute.

The trial court concluded Respondents were immune from the federal claims under the state anti-SLAPP statute. App. B. The trial court did not address Appellant's argument that state law immunity does not apply to federal claims pending in state court.

Appellant appealed to the Nevada Supreme Court. On November 25, 2009, the Court affirmed. It concluded the immunity statute was not an immunity statute and that its application to the federal claims would not undermine federal interests. App. A. This Petition ensued.

SUMMARY OF ARGUMENT

The anti-SLAPP statute, applied to federal claims, immunizes Respondents from liability in a way that could never occur in federal court. The anti-SLAPP statute must be invoked without any opportunity for the usual discovery that would be available in federal court before a dispositive motion on immunity is considered. The federal civil rights plaintiff in a Nevada state court must thus be able to create a genuine issue of material fact on his claims at the outset, and must do so with no discovery, or his or her federal claims will be dismissed. This greatly impedes the federal civil rights plaintiff in Nevada state court, and thwarts congressional intent that these claims be adjudicated on their merits absent the applicability of some *federal* immunity. The anti-SLAPP statute is a state-created substitute for federal immunities that offends the Supremacy Clause. Published precedent like this from a state court of last resort could create similar problems elsewhere, as many states have anti-SLAPP statutes.

REASONS FOR GRANTING THE PETITION

The Nevada Supreme Court held that the anti-SLAPP law could apply in this manner because it did not create an immunity from federal claims, it merely "filters unmeritorious claims". In support of its decision, the Nevada Supreme Court tried to distinguish *Felder v. Casey*, 487 U.S. 131, 139, 108 S.Ct. 2302 (1988) and its language that "[a] state law that immunizes government conduct otherwise subject to suit under Section 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of

the state immunity law would thwart the congressional remedy, which of course already provides certain immunities for state officials," on the ground the anti-SLAPP statute is "not an absolute bar to liability." Nevada opinion at 11:10-11.

Felder considered the statutory requirement of a timely notice of claim and waiting period before commencing suit. The notice-of-claim statute was preempted because it placed a burden on the exercise of a federal right by forcing victims who sought § 1983 redress in state courts to comply with a requirement that was absent from § 1983 litigation in federal courts. Also, enforcement of the statute would frequently and predictably produce different outcomes in § 1983 litigation based solely on whether litigation took place in state or federal court. The Nevada Supreme Court's effort to distinguish *Felder* fails to even consider this underlying rationale, which, when applied to the anti-SLAPP statute, requires reversal.

First, Nevada's "Anti-SLAPP" law places a burden on the exercise of a federal right by forcing victims who sought § 1983 redress in state courts to comply with a requirement that is absent from § 1983 litigation in federal courts. It provides "a person who engages in a good faith communication in furtherance of the right to petition" with "immun[ity] from civil liability for claims based upon the communication." NRS. § 41.650. But it does more than just provide expressly for an "immunity" (contrary to the Nevada Supreme Court's reading of the law as not providing an immunity). It forecloses discovery on the federal claim and requires a federal claim plaintiff to demonstrate a genuine issue of material

fact before any discovery can ever take place. Nevada opinion at 10-11. A "special motion to dismiss" is treated as a motion for summary judgment, NRS § 41.660, but there is no equivalent of Fed.R.Civ.P. 56(f). When a special motion to dismiss is granted, it functions as an adjudication on the merits. NRS § 41.660(4). When a special motion to dismiss is denied, only then do the parties proceed through discovery. Nevada opinion at 10:1-3. Thus, in addition to the express intent of the Nevada legislature to create an immunity, the statute thwarts a congressional remedy by placing a burden on the exercise of a federal right by forcing victims who seek § 1983 redress in state courts to comply with a requirement that is absent from § 1983 litigation in federal courts.

Second, enforcement of the statute would frequently and predictably produce different outcomes in § 1983 litigation based solely on whether litigation took place in state or federal court.

Under *Felder*'s rationale, the Nevada Supreme Court's misguided application of *Felder* should be reversed.

The Nevada Supreme Court ignored these important rationales rooted in the Supremacy Clause, and went on to try to distinguish *Howlett v. Rose*, 496 U.S. 356 (1990) (state statutory immunity case), by finding that the statute here is merely procedural. App. 2 (Nevada opinion at 12-16). The Nevada Supreme Court omitted the exception-to-the-exception, as stated by this Court in its decision in *Howlett*: "States may apply their own neutral procedural rules to federal

claims, unless those rules are pre-empted by federal law." 496 U.S. at 372, citing, *inter alia*, *Felder*, *supra*. As discussed above, under *Felder*, Nevada's statute is preempted because it poses the possibility of a different outcomes on federal claims in state court versus in federal court. Thus, it should be of no moment whether the statute is procedural or substantive.

A state court of last resort has decided an important federal question in a way that conflicts with the decision of a United States Court of Appeals. Certiorari is thus warranted under SCR 10(b). The Nevada Supreme Court's decision conflicts with decisions of the Ninth Circuit Court of Appeals. *Webb v. Sloan*, 330 F.3d 1158, 1167 (9th Cir. 2003) (Nevada state discretionary function immunity does not apply to federal § 1983 claims); *Kimes v Stone*, 84 F.3d 1121 (9th Cir. 1996) (California privilege regarding judicially-related communications did not apply to § 1983 claim against attorneys alleged to have conspired with judicial officers); *see also Ambus v. Granite Brd. Of* Ed., 995 F.2d 992, 995 (10th Cir. 1993) (similar to *Webb*); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 74 (2d Cir. 1992) (same). The Ninth Circuit has correctly allowed the anti-SLAPP defense in federal cases as to supplemental state law claims only. *U.S. v. Lockheed Missles & Space Co.*, 190 F.3d 963, 971 (9th Cir. 1999).

A state court has decided an important federal question in a way that conflicts with relevant decisions of this Court. Certiorari is thus appropriate for this reason. SCR 10(c). Immunity from liability under the federal statutes is derived from federal law. *Howlett v. Rose*, *supra* (holding states cannot apply immunity rules

to § 1983 claims in State courts); *Felder v. Casey*, *supra* ("[a] state law that immunizes government conduct otherwise subject to suit under Section 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy, which of course already provides certain immunities for state officials." (citation omitted)"); *Owen v. City of Independence*, 445 U.S. 622, 647-8, 100 S.Ct. 1398 (1980) (similar); *Martinez v. California*, 444 U.S. 277, 284 n. 8, 100 S.Ct. 553 (1980) (states may not interpose state immunity doctrines to limit or defeat liability in Section 1983 actions); *see also Board of Regents v. Tomanio*, 446 U.S. 478, 100 S. Ct. 1790 (1980) (federal claims not subject to exhaustion of state created remedies).

In *Howlett*, this Court addressed the reach of state sovereign immunity. The question to be addressed here is the same, but as to a different type of state-created immunity. A state court cannot apply state law immunity of this type to a federal claim in state court. The rationale identified in *Howlett* and the other cases cited above is founded in the Supremacy Clause, and state law provisions that undermine the application of federal law in state courts are invalid because they violate the Supremacy Clause. 496 U.S. at 371. *Howlett* makes it clear that not only are the elements of a federal cause of action defined by federal law, the defenses to a federal cause of action are likewise defined by federal law. 496 U.S. at 375. Nevada's anti-SLAPP statute is not a federal defense. The Nevada Supreme Court determined that the statute did not undermine important federal substantive interests because Petitioner did not proceed as the statute requires. App. 2 (Nevada opinion at 16-19). Petitioner could have

stood mute, declining to try to demonstrate a genuine issue of material fact, for the aforementioned reasons. The Nevada Supreme Court proceeded as if this is what occurred. For purposes of this Petition, this Court should assume that is what occurred, as Petitioner's position is that he did not have to show a genuine issue of material fact under a statute that is preempted by federal law.

The Nevada Supreme Court also determined that the Respondents had demonstrated the applicability of the statute. App. 2 (Nevada opinion at 19-22). Petitioner does not challenge this determination either, because if he is correct on the federalism argument, the statute will not apply.

Should this Court grant the Petition and ultimately reverse on these grounds, the case should be remanded for further proceedings absent the application of the anti-SLAPP statute.

CONCLUSION

For these reasons, the Petition should issue.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF NEVADA FILED NOVEMBER 25, 2009

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 48101

GREG JOHN,

Appellant,

vs.

DOUGLAS COUNTY SCHOOL DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA; TOM MORGAN, AN INDIVIDUAL; KATHERINE MILNER, AN INDIVIDUAL; GARY DIEDRICH, AN INDIVIDUAL; AND MARTY SWISHER, AN INDIVIDUAL,

Respondents.

BEFORE THE COURT EN BANC.

OPINION

By the Court, GIBBONS , J.:

This case arises out of an employment discrimination lawsuit. Appellant Greg John was a security officer for the Douglas County School District (DCSD). Other staff members of the school district alleged that John engaged in both unprofessional conduct and sexual

harassment. Following the school district's investigation, John was suspended. John appealed the suspension under the collective bargaining agreement between the school district and his union, but the suspension was upheld. Later, John filed an Equal Employment Opportunity Commission (EEOC) complaint against the school district, but the EEOC did not find any violations. After the EEOC dismissed John's complaint, he filed an employment discrimination lawsuit in Nevada district court against the school district and various officials alleging both federal and state causes of action.

Approximately one year later, the school district discovered that John had improperly obtained confidential student records, and he failed to cooperate with the school's investigation into that conduct. After the investigation concluded, the school district fired John because of the information obtained during the records investigation and John's previous misconduct. Following John's termination, the school district filed a special motion to dismiss under Nevada's anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute. The district court granted the school district's motion, and John now appeals that order.

There are two primary issues on appeal. The threshold issue is whether Nevada's anti-SLAPP statute applies to John's federal causes of action raised in Nevada district court. John's three federal causes of action include the following: (1) religious discrimination, (2) First Amendment violations, and (3) civil rights violations. We conclude that Nevada's anti-SLAPP

statute does apply to these federal causes of action because it is a neutral and procedural statute that does not undermine any federal interests.

Having concluded that Nevada's anti-SLAPP statute applies to John's federal causes of action, the next issue we consider is whether the district court erred in dismissing John's lawsuit under the statute. We conclude that the district court properly dismissed John's lawsuit for two reasons. First, the school district made a threshold showing that the communications by school employees and the DCSD regarding John's inappropriate behavior at work and the resulting investigations were protected under the anti-SLAPP statute, and this showing shifted the burden of production to John. Second, John failed to allege a genuine issue of material fact regarding the claims he filed based on the communications by school employees and the DCSD about the investigations into his conduct at work. As a result, the district court properly dismissed John's lawsuit.

RELEVANT PROCEDURAL HISTORY AND FACTS

I. The DCSD's investigations

John began working as a security officer for the DCSD in 1989. In 2003, a fellow security officer resigned due to John's unprofessional behavior. During his exit interview, the security officer stated that John engaged in various forms of unprofessional conduct, including

egregious racial and sexual remarks about students and other staff members. John also videotaped special education students, made sexually explicit narrations regarding the students, and then showed the video to others.

In addition, a fellow DCSD employee accused John of sexual harassment. After an investigation into the allegations, John received a letter of discipline from the DCSD, which warned that further unprofessional conduct would result in his termination. At the same time, John received a two-week suspension without pay, mandatory sexual misconduct training, and mandatory anger management counseling. The DCSD also prohibited John from using the video surveillance equipment. John filed a grievance with his union, but the discipline was upheld at all three levels of the union's grievance process. John then filed a claim with the EEOC, but the commission concluded that there was no violation.

In 2005, John obtained confidential student disciplinary records, and he failed to cooperate with the school district's subsequent investigation into the matter. As a result, the DCSD suspended John until the conclusion of the investigation. Upon conclusion of the investigation, the DCSD fired John due to the information obtained during the records investigation and John's previous misconduct.

Appendix A

II. The federal employment lawsuit in Nevada district court

In 2004, prior to his termination but after exhausting the EEOC's administrative process, John filed a lawsuit against the DCSD alleging the following: (1) the DCSD engaged in religious discrimination against John, a Protestant, under Title VII; (2) John has a disability under the Americans with Disabilities Act (ADA), which the school district violated; (3) the DCSD violated John's right to free speech, under 42 U.S.C. § 1983, when it retaliated against him for his protesting the removal of his video surveillance duties; and (4) various DCSD officials made false and defamatory statements about John without privilege or justification. In the lawsuit, John also named private individuals working for the DCSD as defendants because they provided information to the DCSD during its investigations of John. For instance, John named a teacher's aid as a defendant because she reported during a DCSD investigation that John had sexually harassed her. John also named the vice principal of Douglas High School as a defendant, alleging that the vice principal discriminated against John based on his Protestant religion by assisting in the DCSD's investigations. Finally, John named a former DCSD security officer as a defendant after the security officer reported to the DCSD during an exit interview that John engaged in various forms of unprofessional conduct, including egregious racial and sexual remarks about students and other staff members.

After John filed the lawsuit, the DCSD filed a motion to dismiss, alleging that the collective bargaining agreement between the school district and John's union barred his claims. The district court dismissed John's state-based defamation claim but denied the motion with respect to the federal Title VII, ADA, and § 1983 claims.

After John's termination, he amended his complaint to include the DCSD officer who fired him, and to include a fifth count: that the DCSD wrongfully terminated him. In response, the DCSD filed a special motion to dismiss under Nevada's anti-SLAPP statute, NRS 41.660. The school district asserted that the school officials' actions related to the investigations of John constituted protected conduct under the statute, and the communications between school officials and the DCSD in furtherance of these investigations were privileged and truthful. The district court granted the DCSD's special motion to dismiss, finding that the DCSD's actions were protected activity under the anti-SLAPP statute, and that John failed to provide sufficient evidence to demonstrate a probability of success regarding his claims. Specifically, the district court found that John's supplemental declaration provided insufficient evidence to set forth a genuine issue of material fact. John now appeals the district court's order granting the DCSD's special motion to dismiss under Nevada's anti-SLAPP statute.

Appendix A

DISCUSSION

We first explain the purpose of Nevada's anti-SLAPP statute and the standard of review. Afterwards, we analyze and conclude that Nevada's anti-SLAPP statute applies to John's federal claims, and therefore, the district court properly dismissed his lawsuit.

I. Nevada's anti-SLAPP statute

A SLAPP lawsuit is characterized as "'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" *Dickens v. Provident Life and Acc. Ins. Co.*, 117 Cal. App. 4th 705, 11 Cal. Rptr. 3d 877, 882 (Ct. App. 2004) (quoting *Wilcox v. Superior Court (Peters)*, 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446, 449 n.2 (Ct. App. 1994), *abrogated on other grounds by Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507, 52 P.3d 685, 694 n.5 (Cal. 2002)). The hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned. *U.S. Ex Rel. Newsham v. Lockheed Missiles*, 190 F.3d 963, 970 (9th Cir. 1999). For instance, the California Court of Appeal in *Dickens* affirmed a trial court's grant of an anti-SLAPP motion striking a malicious prosecution count from a complaint. 11 Cal. Rptr. 3d at 877-78. The *Dickens* case arose when the plaintiff sued an insurance company and an insurance investigator alleging they initiated an improper prosecution of the plaintiff by the federal government for insurance fraud. *Id.* at 878.

When affirming the district court's order, the court reasoned that the defendants' communications in preparation for a government investigation were in furtherance of their constitutional rights to free speech, and therefore, they were entitled to the benefits of California's anti-SLAPP statute. *Id.* at 883, 885.

Nevada's anti-SLAPP statute was enacted in 1993, shortly after California adopted its statute, and both statutes are similar in purpose and language. *See* NRS 41.660; Cal. Civ. Proc. Code § 425.16 (West 2004 & Supp. 2009). NRS 41.660 defines the type of lawsuits subject to anti-SLAPP motions in Nevada. It says that when a plaintiff brings an action "against a person based upon a good faith communication in furtherance of the right to petition," the defendant may bring a special motion to dismiss within 60 days of service of the complaint. NRS 41.660(1)-(2). When amending Nevada's anti-SLAPP statute in 1997, the Legislature explained that SLAPP lawsuits abuse the judicial process by chilling, intimidating, and punishing individuals for their involvement in public affairs. 1997 Nev. Stat., ch. 387, preamble, at 1364. The Legislature further reasoned that the number of SLAPP lawsuits in Nevada had increased, and therefore, implementation of an anti-SLAPP statute was essential to protect citizens' constitutional rights. *Id.*

Further, the purpose of Nevada's anti-SLAPP statute is similar to the purpose behind the *Noerr-Pennington* immunity doctrine. *See Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365

U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); *Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965). According to this doctrine, "those who petition all departments of the government for redress are generally immune from liability." *Empress LLC v. City and County*, 419 F.3d 1052, 1056 (9th Cir. 2005). The basis of this doctrine is that representative democracy demands that citizens and public officials have the ability to openly engage in discussions of public concern. *Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1093 (9th Cir. 2000). As a result, the private or public petitioning of governmental entities is insufficient to violate federal substantive rights. *Id.* In addition, *Noerr-Pennington* immunity does not apply to "sham" cases where a person abuses the government process in order to achieve some benefit. *Boulware v. State of Nev., Dept. of Human Res.*, 960 F.2d 793, 797 (9th Cir. 1992).

Similarly, Nevada's anti-SLAPP statute is predicated on protecting "well-meaning citizens who petition [the] government and then find themselves hit with retaliatory suits known as SLAPP[ ] [suits]." Comments by State Senator on S.B. 405 Before the Senate, 67th Leg." (Nev., June 17, 1993). More importantly, the anti-SLAPP statute only protects citizens who petition the government from civil liability arising from *good-faith communications to a government agency.* NRS 41.637. Thus, Nevada's anti-SLAPP statute is not an absolute bar against federal substantive claims; rather, it bars claims from persons who seek to abuse other citizens' rights to petition their government, and it allows meritorious claims against citizens who do not petition the government in good faith.

II. Standard of review

Pursuant to NRS 41.660(3)-(4), the district court shall treat the special motion to dismiss as a motion for summary judgment, and its granting the motion is an adjudication upon the merits. This court, therefore, reviews de novo the district court's order granting the anti-SLAPP motion. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (setting forth that a district court's order granting a summary judgment motion is reviewed de novo).

Since the special motion to dismiss is procedurally treated as a summary judgment, the following standards apply. First, the district court can only grant the special motion to dismiss if there is no genuine issue of material fact and "'the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting NRCP 56(c)). Second, the nonmoving party cannot overcome the special motion to dismiss "'on the gossamer threads of whimsy, speculation and conjecture.'" *Id.* at 731, 121 P.3d at 1030 (quoting *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713-14, 57 P.3d 82, 87 (2002)) (other internal quotations omitted). Instead, the nonmoving party must provide more than general allegations and conclusions; it must submit specific factual evidence "'demonstrating the existence of a genuine factual issue.'" *Id.* at 731, 121 P.3d at 1030-31 (quoting *Pegasus*, 118 Nev. at 713, 57 P.3d at 87).

Therefore, when a party moves for a special motion to dismiss under Nevada's anti-SLAPP statute, it bears the initial burden of production and persuasion. This means the moving party must first make a threshold showing that the lawsuit is based on "good faith communication[s made] in furtherance of the right to petition" the government. NRS 41.650; *see Globetrotter Software v. Elan Computer Group*, 63 F. Supp. 2d 1127, 1129 (N.D. Cal. 1999) (noting that "[a] defendant filing an anti-SLAPP motion must make an initial prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's rights of petition or free speech"). If the moving party satisfies this threshold showing, then the burden of production shifts to the nonmoving party, who must demonstrate a genuine issue of material fact. *See Globetrotter*, 63 F. Supp. 2d at 1129 (recognizing that under California's anti-SLAPP statute, the nonmoving party must demonstrate a probability of prevailing on the merits). If the nonmoving party successfully meets its burden, then the case proceeds to discovery and, potentially, trial. Otherwise, the district court must dismiss the action, and that dismissal operates as an adjudication on the merits. NRCP 56(c); NRS 41.660(3)-(4).

III. Nevada's anti-SLAPP statute applies to John's federal claims because it is not a state sovereign-immunity statute nor does it undermine any federal interests

John argues that the district court erred in applying Nevada's anti-SLAPP statute to his federal claims because immunity from federal civil rights statutes cannot arise from state sovereign-immunity law. In other words, John argues that federal law preempts the application of Nevada's anti-SLAPP statute to federal claims. We disagree because Nevada's anti-SLAPP statute differs from state sovereign-immunity statutes and does not undermine any federal interests. In this section, we first consider the difference between Nevada's anti-SLAPP statute and state sovereign-immunity statutes. We then consider whether application of Nevada's anti-SLAPP statute to John's federal claims undermines important federal interests.

A. Nevada's anti-SLAPP statute differs significantly from state sovereign-immunity statutes

John relies on *Ortega v. Reyna*, 114 Nev. 55, 953 P.2d 18 (1998), *abrogated by Martinez v. Maruszczak*, 123 Nev. 433, 443-44 & n.28, 168 P.3d 720, 727 & n.28 (2007), for the assertion that Nevada's anti-SLAPP statute cannot apply to a federal substantive claim. Citing *Ortega*, 114 Nev. at 62 & n.5, 953 P.2d at 23 & n.5, he argues by analogy that because state sovereign-immunity laws cannot insulate the state from 42 U.S.C.

§ 1983 claims, likewise Nevada's anti-SLAPP statute cannot insulate the school district from John's discrimination claims. John's reliance on *Ortega*, however is misplaced. While it is true that state sovereign immunity is not a defense to a § 1983 claim, there is a significant difference between state sovereign immunity and Nevada's anti-SLAPP statute.

In *Felder v. Casey*, the United States Supreme Court stated that "a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy." 487 U.S. 131, 139, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988). Nevada's anti-SLAPP statute, however, is not an absolute bar to liability. Whereas immunity would bar all claims including meritorious claims, Nevada's anti-SLAPP statute differs as it permits cases to proceed to discovery and trial after a nonmoving party makes an initial demonstration of merit. *See Globetrotter*, 63 F. Supp. 2d at 1129.

In other words, Nevada's anti-SLAPP statute filters unmeritorious claims in an effort to protect citizens from costly retaliatory lawsuits arising from their right to free speech under both the Nevada and Federal Constitutions. *See* Comments by State Senator on S.B. 405 Before the Senate, 67th Leg. (Nev., June 17, 1993). Thus, like the federal preemption of state sovereign immunity in § 1983 cases, Nevada's anti-SLAPP statute seeks to promote and protect a citizen's exercise of his

or her constitutional rights. As a result, federal preemption under the immunity analysis does not prevent the application of Nevada's anti-SLAPP statute to John's federal claims.

B. The federal interest analysis

We next analyze whether Nevada's anti-SLAPP statute undermines any important federal interests. The first issue in this section is whether Nevada's anti-SLAPP statute is neutral and procedural. This is an important consideration because a state court's determination that it lacks jurisdiction over a federal claim due to a neutral and procedural statute should only be overturned with great caution. *Howlett v. Rose*, 496 U.S. 356, 372, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990). The second issue we consider is whether Nevada's anti-SLAPP statute undermines any important federal interests. For this analysis, we discuss whether there is a genuine issue of material fact regarding any of John's three federal claims.

1. Nevada's anti-SLAPP statute is neutral and procedural

The DCSD argues that Nevada's anti-SLAPP statute is a neutral and procedural statute that does not obstruct federal substantive law. We agree.

As courts of general jurisdiction, Nevada district courts have the authority to decide federal claims. *Id.* at 367. This authority arises from the federal

Supremacy Clause, U.S. Const. art. VI, cl. 2., which "charges state courts with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure." *Howlett*, 496 U.S. at 367. In *Howlett*, the United States Supreme Court recognized three corollaries that arise from this concurrent jurisdiction, and the corollary relevant to this case is the following: "When a state court refuses jurisdiction because of a *neutral state rule regarding the administration of the courts*, [the Supreme Court] must act with utmost caution before deciding that it is obligated to entertain the claim." *Id.* at 369, 372 (emphasis added).

Although the Supremacy Clause requires state courts to treat federal substantive law as the law of the land, the clause does not require state courts to apply federal procedural rules. *See Johnson v. Fankell*, 520 U.S. 911, 919, 117 S. Ct. 1800, 138 L. Ed. 2d 108 (1997) (discussing state court authority to refuse jurisdiction over a federal claim based on a neutral procedural state court rule). "'[F]ederal law takes the state courts as it finds them.'" *Id.* (quoting *Howlett*, 496 U.S. at 372) (other internal quotations omitted).

Therefore, Nevada's anti-SLAPP statute may apply to John's federal claims if it is a neutral and procedural statute. When determining whether Nevada's anti-SLAPP statute falls within this category, we consider California caselaw because California's anti-SLAPP statute is similar in purpose and language to Nevada's anti-SLAPP statute. *See* NRS 41.660; Cal. Civ. Proc. Code § 425.16 (West 2004 & Supp. 2009).

In *Bradbury v. Superior Court (Spencer)*, the appellant raised an argument in a California Court of Appeal that was similar to John's assertion that Nevada's anti-SLAPP statute does not apply to federal substantive claims. 49 Cal. App. 4th 1108, 57 Cal. Rptr. 2d 207, 213 (Ct. App. 1996). The *Bradbury* appellant argued that California's anti-SLAPP statute does not apply to federal civil rights claims. *Id.* The court rejected this argument, holding that "[w]here the action is founded on a federal statute and brought in state court, state procedure controls unless the federal statute provides otherwise." *Id.* Thus, the appellate court applied California's anti-SLAPP statute to the federal civil rights claim because it viewed the statute's provisions as procedural in nature. *Id.*; *see generally Vergos v. McNeal*, 146 Cal. App. 4th 1387, 53 Cal. Rptr. 3d 647 (Ct. App. 2007) (applying California's anti-SLAPP statute to a federal civil rights action).

Moreover, California's anti-SLAPP statute allows a defendant to a SLAPP lawsuit to file a special motion to strike the lawsuit within 60 days of service of the complaint or in the court's discretion. Cal. Civ. Proc. Code § 425.16(b)(1), (f) (West 2004 & Supp. 2009). Once the defendant proves that the anti-SLAPP statute applies, the burden of production shifts to the plaintiff to show that there is a probability that he or she will prevail on the claim. *Id.* "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." Cal. Civ. Proc. Code § 425.16(b)(2). The district court's ruling on the motion is an adjudication on the merits. Cal. Civ. Proc. Code § 425.16(i).

Similarly, Nevada's anti-SLAPP statute allows the defendant to file a special motion to dismiss within 60 days of service of the complaint. NRS 41.660(1)-(2). The statute requires the district court to treat the special motion to dismiss as a motion for summary judgment, and its granting the motion is an adjudication upon the merits. NRS 41.660(3)-(4). Thus, once the defendant proves that Nevada's anti-SLAPP statute applies to the case, the burden of production shifts to the plaintiff to show that there is a genuine issue of material fact.

A comparison of the two statutes illustrates that both statutes create a procedural requirement that the plaintiff must overcome if his claim is to proceed to discovery and trial. Essentially, both statutes treat the procedure as a form of summary judgment wherein both parties are allowed to present their evidence. NRS 41.660(3); Cal. Civ. Proc. Code § 425.16(b)(1)-(3) (West 2004 & Supp. 2009). The burden of production is initially on the defendant who must demonstrate the applicability of the statute. *See Globetrotter Software v. Elan Computer Group*, 63 F. Supp. 2d 1127, 1129 (N.D. Cal. 1999). Once he meets his initial burden, the burden shifts to the plaintiff who must show that his claim has merit. *See id.* And at all times, the burden of persuasion is on the defendant. *See* NRS 41.660; Cal. Civ. Proc. Code § 425.16(b)(1)-(3).

In providing an additional pretrial mechanism for filtering frivolous claims from those claims having arguable merit, these statutes amount to a unique summary judgment motion, a motion that, if granted, is

appealable. *See Lee v. GNLV Corp.*, 116 Nev. 424, 428, 996 P.2d 416, 418 (2000) (concluding the district court order granting summary judgment was an appealable final judgment). Neither statute creates a substantive cause of action or defense. Instead, like rules of civil procedure, the statutes create a procedural mechanism to prevent wasteful and abusive litigation by requiring the plaintiff to make an initial showing of merit. Thus, Nevada's anti-SLAPP statute is procedural in nature. *Cf. U.S. Ex Rel. Newsham v. Lockheed Missiles*, 190 F.3d 963, 973 (9th Cir. 1999) (applying California's anti-SLAPP statute to pendent state law counterclaims and, while recognizing the state interest in deterring frivolous, retaliatory litigation as substantive to the extent of meriting application in federal court, characterizing the anti-SLAPP statute as a state procedural statute for purposes of its analysis).

In addition, the statute is neutral in application. The statute applies to both state and federal substantive claims raised by either a plaintiff's complaint or a defendant's counterclaim. Further, the statute only applies in those cases involving "[g]ood faith communication in furtherance of the right to petition" the government. NRS 41.637. Thus, the statute is neutral and limited in its application. *See* 17A James Wm. Moore, *Moore's Federal Practice* § 124.61 (3d ed. 2009) (stating that "[s]tates may apply their own neutral procedural rules to federal claims, unless federal law preempts those rules because application of the state rules would defeat federal substantive rights").

Consequently, we agree with the reasoning set forth in *Bradbury* and conclude that, based on the similarities between Nevada's anti-SLAPP statute and California's comparable statute, Nevada's anti-SLAPP statute is a neutral and procedural statute.

2. Nevada's anti-SLAPP statute does not undermine any important, substantive federal interests

Although Nevada's anti-SLAPP statute is neutral and procedural, it cannot be applied to federal claims under the Supremacy Clause if it defeats federal rights or frustrates "[c]ongressionally-created substantive rights." 17A Moore, *supra*, § 124.62. Here, John alleges three substantive claims, including: (1) religious discrimination, (2) violation of the ADA, and (3) civil rights violations against his free speech. However, he fails to identify how Nevada's anti-SLAPP statute would undermine or frustrate important federal rights.

In *Lockheed*, the Ninth Circuit Court of Appeals recognized that both California's anti-SLAPP statute and the Federal Rules of Civil Procedure "serve similar purposes, namely the expeditious weeding out of meritless claims before trial." 190 F.3d at 972. In addition, the Ninth Circuit recognized that anti-SLAPP statutes protect a citizen's right to petition his government without repercussion. *Id.* at 973. Given these two characteristics of anti-SLAPP statutes, including Nevada's, and John's failure to identify any undermined or frustrated federal interests, we conclude that

Nevada's anti-SLAPP statute does not violate any important, substantive federal interests in this case.

With regard to John's religious discrimination claim, he alleged that the DCSD engaged in adverse employment actions against him due to his Protestant religion. At the hearing on the special motion to dismiss, the DCSD submitted evidence that it was not aware of John's religious beliefs. In response, John failed to provide any evidence of religious discrimination other than his own general allegations in his pleadings.

John also alleged that the school district had violated the ADA because his alcoholism constituted a disability under the Act and the school district's adverse employment actions violated the Act. While alcoholism is a disability under the ADA, John failed to provide any documentation supporting his claimed disability or adverse employment treatment. *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1187 (9th Cir. 2001). Instead, the evidence shows that the DCSD terminated John for, among other things, his failure to cooperate with a school investigation after he obtained confidential student disciplinary records. Further, when responding to John's EEOC complaint, the DCSD stated that it did not know of John's alcoholism, and he never sought accommodation for any disability.

Finally, John alleged civil rights violations against his freedom of speech. After the DCSD initially investigated John's behavior, it found, among other things, that he had inappropriately used school

surveillance equipment. In addition to a suspension, the DCSD also removed John's access to video equipment, and John objected. At the hearing, John failed to rebut the DCSD argument that *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), precluded his First Amendment claim because his objections to the removal of his surveillance duties are not protected communications.

In *Garcetti*, the United States Supreme Court held that when a public employee is not speaking as a citizen on a matter of public concern, then the employee has no First Amendment cause of action against the employer for its reaction to the speech. *Id.* at 418. Further, the Supreme Court held that "[a] government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." *Id.* Here, John was abusing the school district's video equipment—by taping special education students, sexually narrating the taping, and showing it to others—in a manner that could open the DCSD to liability. Further, the DCSD asserted that John's use of the equipment was creating a hostile work environment, adversely affecting the school district's operations.

In addition, the Ninth Circuit has also stated that First Amendment protection does not apply to public employees making statements pursuant to their official duties. *Marable v. Nitchman*, 511 F.3d 924, 929 (9th Cir. 2007). Thus, John's disagreement with the school

district over the removal of his video equipment duties is not protected speech.

As a result, we conclude that John's failure to rebut the DCSD's positions does not mean Nevada's anti-SLAPP statute undermined or frustrated any federal substantive claims. On the contrary, John could have proceeded with his federal substantive claims had he shown a genuine issue of material fact. In other words, Nevada's neutral and procedural anti-SLAPP statute neither undermines nor frustrates John's federal substantive claims. As a result, Nevada district courts can apply the statute to cases involving similar SLAPP claims.

We now discuss whether Nevada's anti-SLAPP statute can be used by private individuals or a government entity to dismiss a complaint when the private individuals or government entity claim that the communications for which they are being sued were truthful, made without knowledge of falsehood, or regard a matter of reasonable concern to the government entity.

IV. Nevada's anti-SLAPP statute can be used by private individuals or a government entity to seek dismissal of a SLAPP complaint

John argues that there is a genuine issue of material fact regarding whether the communication between the various school employees and the DCSD were good-faith communications made in furtherance of the right to free

speech. Particularly, he argues that his supplemental declaration filed in opposition to the special motion to dismiss establishes that the communications were discriminatory and retaliatory and not made to a government agency. We disagree because John's supplemental declaration did not set forth a genuine issue of material fact regarding whether the communications were discriminatory or retaliatory, and Nevada's anti-SLAPP statute applies to school districts.

"Statutory construction is a question of law that this court reviews de novo." *Richardson Constr. v. Clark Cty. Sch. Dist.*, 123 Nev. 61, 64, 156 P.3d 21, 23 (2007). When interpreting a statute, this court looks to the plain statutory language and gives effect to the Legislature's intent. *Id.*

Looking at the plain language of Nevada's anti-SLAPP statute, there are three classes of petitions protected by the statute. The first two classes include any communication that is truthful or made without knowledge of falsehood and is made for the following reasons: (1) to procure government or electoral action or (2) to address a matter that reasonably concerns the petitioned governmental entity. NRS 41.637(1)-(2). The third protected class includes any written or oral statement that is truthful or made without knowledge of falsehood and directly addresses an issue before "a legislative, executive or judicial body, or any other official proceeding authorized by law." NRS 41.637(3).

The second class of protected petitions applies to all political subdivisions of Nevada as defined by NRS 41.0305, which includes school districts. NRS 41.637(2). Thus, Nevada's anti-SLAPP statute protects good-faith communications if those communications were truthful or made without knowledge of falsehood and regard a matter of reasonable concern to the school district. *Id.*

Further, employers, like the DCSD, may receive the benefits of Nevada's anti-SLAPP statute based on the reasoning in *Raining Data Corp. v. Barrenechea*, 175 Cal. App. 4th 1363, 97 Cal. Rptr. 3d 196 (Ct. App. 2009). The *Raining Data* case arose after an employer, Raining Data, brought an action against its former employee for misappropriation of trade secrets. *Id.* at 198. The former employee responded by filing a cross-complaint against Raining Data alleging claims arising from the employer's filing of the complaint and communicating with customers and prospective customers. *Id.* at 198, 200. After the former employee filed his cross-complaint, Raining Data filed a motion to strike the entire cross-complaint under California's anti-SLAPP statute. *Id.* at 198. The district court granted Raining Data's motion, and the California Court of Appeal affirmed, reasoning that Raining Data made a threshold showing that the former employee's claims arose from a protected activity but the former employee failed to show a probability of success on the merits. *Id.* at 202-03. We agree with the reasoning set forth in *Raining Data* and conclude that the DCSD may receive the benefits of Nevada's anti-SLAPP statute if it shows that John's claims arose from protected activity, and John fails to show a genuine issue of material fact.

Appendix A

A. The communications were truthful or made without knowledge of falsehood

Here, the DCSD provided the following evidence to support its position that the communications were in furtherance of its right to free speech: (1) exit interview documents, (2) John's training and counseling documents, (3) John's letter of discipline,(4) the Douglas High principal's responsive memorandum regarding John's EEOC complaint, (5) EAP records regarding John's counseling, (6) the DCSD's response to John's EEOC complaint, and (7) the EEOC's finding of a lack of information to establish any violations. Further, the school district provided written evidence that it was unaware of John's religion and his alleged disability. All of these documents are communications to or by the school district in the context of various investigations. Thus, the DCSD provided enough information to shift the burden of production to John.

John, however, has not provided any evidence that the communications were untruthful or made with knowledge of falsehood. John submitted a supplemental declaration in opposition to the DCSD's special motion to dismiss. However, the district court determined that this declaration was insufficient to establish a genuine issue of material fact because it merely disagreed in narrative form with the DCSD's credible evidence. We conclude that John's declaration, although procedurally sufficient, failed to set forth specific facts demonstrating a genuine issue of material fact regarding whether the communications were untruthful or made with

knowledge of their falsehood. NRCP 56(e); *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1030-31 (2005). Moreover, the DCSD's subsequent investigations supported the veracity of the communications. A report from Ms. Ann Silver, an independent third party that held individual training sessions with John, stated that John acknowledged his unprofessional behavior as it applied to his inappropriate use of the video equipment, the offensiveness of his verbal comments, and the sexual harassment allegations.

B. The communications were of reasonable concern to the school district

John also failed to establish a genuine issue of material fact as it applied to the school district's concern over the matters communicated to it. The matters communicated to the DCSD were of reasonable concern to the district because they addressed the school environment as it applied to staff and students and they impacted the school district's potential legal liability. The DCSD's affidavits, interview documents, and disciplinary documents established that the written and oral statements against John were part of the school district's investigation into his conduct. Since John failed to provide any evidence in his supplemental declaration that the communications were not matters of reasonable concern to the school district, he failed to meet his burden of production. As a result, the district court correctly held that the anti-SLAPP statute applied to the communications, which were good-faith communications in furtherance of the right to free speech as defined by NRS 41.637.

Appendix A

CONCLUSION

We conclude that Nevada's anti-SLAPP statute does apply to John's federal causes of action because it is a neutral and procedural statute that does not undermine any federal interests. We further conclude that the district court properly dismissed John's lawsuit because the school district made a threshold showing that the relevant communications were protected under the anti-SLAPP statute, and John failed to establish a genuine issue of material fact regarding the relevant communications. Thus, we affirm the district court's dismissal of John's complaint.

s/ Gibbons, J.
Gibbons

APPENDIX B — ORDER OF THE IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF DOUGLAS FILED JULY 21, 2006

IN THE NINTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

GREG JOHN,

Plaintiff,

vs.

DOUGLAS COUNTY SCHOOL DISTRICT, a political subdivision of the State of Nevada, TOM MORGAN, an individual, KATHERINE MILNER, an individual, GARY DIEDRICH, an individual, RICH ALEXANDER, an individual, MARTY SWISHER, an individual,

Defendants.

ORDER

THIS MATTER comes before the Court on Defendants' Special Motion to Dismiss and Stay Discovery pursuant to *NRS 41.635 et seq.*, or in the alternative, Motion for Summary Judgment and Motion to Strike; and Plaintiff's Motion to Strike. The Court having examined all relevant pleadings and papers on file herein hereby orders, good cause appearing:

Appendix B

That Defendants' Special Motion to Dismiss is GRANTED.

IT IS FURTHER ORDERED that Defendants' Motion to Strike is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Motion to Strike is DENIED.

The background facts giving rise to the instant litigation have been adequately briefed by the parties and will not be repeated unless relevant and necessary to clarify the ruling on pending motions. The Motion to Dismiss pursuant to *NRS 41.635 et seq.*, ("anti-SLAPP" statute) or in the alternative, Motion for Summary Judgment was filed on March 27, 2006. Plaintiff opposed the Motion and a hearing was held on May 10, 2006 at which the Court found that the Defendants had provided a prima facie case for the applicability of the anti-SLAPP statute. The Court also advised the Plaintiff that his opposition was inadequate to rebut such a finding.

Nevertheless, due to the condition of the pleadings (i.e., Plaintiff's bare assertions versus the authorities and evidentiary material offered by the Defendants), the draconian nature of the anti-SLAPP statute, and in the interest of judicial economy, the Court, on agreement of the parties, held its ruling on the Special Motion in abeyance and allowed the Plaintiff another opportunity to file a responsive pleading. Thereafter, the Plaintiff and Defendants filed a supplemental opposition and reply respectively. Additionally, the Plaintiff filed a

Appendix B

Motion to Strike the Special Motion to Dismiss and the Defendants filed a Motion to Strike the Plaintiff's Voluntary Dismissal of his Fifth Claim for Relief. All motions were set for oral argument; however, the hearing was cancelled at the Plaintiff's request and thereafter the parties stipulated to waive oral arguments and submit the motions to the Court for decision.

DEFENDANTS' SPECIAL MOTION TO DISMISS

Plaintiff's amended complaint alleges religious discrimination, violation of the Americans with Disabilities Act, and violation of the First Amendment relating to his employment as a security officer with the Douglas County School District. In the instant Motion, Defendants assert they are immune from civil liability pursuant to *NRS 41.650* and therefore the Complaint and Amended Complaint must be dismissed, or in the alternative, summary judgment should be awarded in their favor. In opposition, Plaintiff contends that the Defendants did not and cannot establish immunity under the anti-SLAPP statute and thus the burden did not shift to him to show a probability of success. Nonetheless, Plaintiff argues that his supplemental opposition and declaration are sufficient to show a probability of success and thus sustain his burden under the anti-SLAPP statute.

Under *NRS 41.635 et seq.*, a person is immune from civil liability for claims based upon their good faith communication in furtherance of the right to petition if

such communication is truthful or is made without knowledge of its falsehood. Under the statute, the person against whom the lawsuit is brought may file a special motion to dismiss within sixty days of service of the complaint. *NRS 41.660. A* court is required to treat such a motion as one for summary judgment. *Id.*

"Summary judgment is appropriate when, after an examination of the record viewed in a light most favorable to the nonmoving party, no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law." *Simonian v. Univ. & Cmty. College Sys.*, 128 P.3d 1057, 1059 (2006), citing *Wood v. Safeway, Inc.*, 121 Nev. __, 121 P.3d 1026, 1029 (2005) (adopting the standard employed in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Celotex v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); and *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Wood*, 121 P.3d at 1031. The burden of establishing the nonexistence of any genuine issue of material fact rests with the moving party; however, the non-moving party "must set forth facts demonstrating the existence of a genuine issue in order to withstand a disfavorable summary judgment." *Id.*

Here, the Defendants have set forth in detail the circumstances regarding the review procedure and eventual termination of the Plaintiff's employment with

the Defendant School District. In opposition, the Plaintiff relies on his unverified declaration and allege it is sufficient to sustain his burden under the anti-SLAPP statute. However, for the following reasons, the Court concludes that the Defendants have established that no genuine issue of material fact exist and that they are entitled to judgment as a matter of law.

Generally, a SLAPP suit, i.e., a strategic lawsuit against public participation, seeks to chill a party's exercise of their constitutional rights to free speech and to petition the government for redress or grievances. *Briggs v. Eden Council for Hope & Community*, 81 Cal.Rptr.2d 471, 969 P.2d 564 (1999). In response, state legislatures enacted anti-SLAPP statutes which typically provide a procedural remedy to dispose of SLAPP suits. In Nevada, *NRS 41.635 et seq.*, was enacted as an anti-SLAPP statute and was intended to reduce SLAPP suits and the associated costs of litigation. *See Senate Comm. on Judiciary, Legislative History of S .B. 405 at 38* (1993) [Defendants' Ex: 10, *Special Motion to Dismiss*]. To date, the Nevada Supreme Court has not addressed the issue and therefore the Court reviewed numerous precedent from various jurisdictions including California. California courts evaluate an anti-SLAPP motion by first determining whether the defendant has a made a threshold showing that the alleged SLAPP suit is based on the defendant's protected activity. *Rusheen v. Cohen*, 39 Cal.Rptr.3d 516, 521, 128 P.3d 713, 717 (2006). Then, if the court determines that the action is based on the defendant's protected activity, the burden shifts to the plaintiff to show a probability of success on the merits. *Id.*

Appendix B

The Court concludes that Nevada's anti-SLAPP statute essentially places the initial burden on a defendant to show that the alleged causes of action arose from their good faith communication in furtherance of the right to petition, i.e., that the lawsuit is a SLAPP. If a defendant overcomes this initial burden, then the nonmoving party must show, under *NRS 41.660(3)(a)*, that a genuine issue of material fact exists as to whether or not the lawsuit is a SLAPP. The Court concludes that the nonmoving party may overcome this burden by showing a probability of success. The Court's conclusion is based on the pertinent Nevada Legislative history and relevant case law cited by the Defendants. Based on the Legislative history it is clear that our Legislators were concerned about the rise in SLAPP lawsuits and thus, intended to impose a heightened showing requirement on SLAPP plaintiffs and although the anti-SLAPP statute does not specifically state such a condition, it is this Court's conclusion that such a condition was intended by requiring a plaintiff to meet the standard of proof required on summary judgment. Thus, the Court concludes that after a defendant has established the suit is a SLAPP, the burden shifts to the plaintiff to show some measure of potential success.

Here, the instant case is a clear example of the type of litigation our State Legislature sought to restrict by enacting the anti-SLAPP statute. Specifically, the Plaintiff's causes of action are based on the Defendants' protected activity and the Plaintiff's responses to the Defendants' Motion are insufficient to create a genuine

issue of material fact as to the probability of success because Plaintiff relies solely on an unverified declaration which merely disagrees with the Defendants' affidavits and other credible evidence. Therefore, the Defendants' Special Motion to Dismiss is granted and the amended complaint is dismissed with prejudice. The Court considered Plaintiff's other arguments in opposition to the Defendants' Special Motion to Dismiss and concludes that they lack merit.

PLAINTIFF'S MOTION TO STRIKE SPECIAL MOTION TO DISMISS.

Notwithstanding the merits of the Defendants' Special Motion to Dismiss the Plaintiff argues that the Motion is should not be considered because it was not filed within sixty days of service of the original complaint as provided by*NRS 41.660(2).* Defendants contend that their Motion was timely because the sixty-day period began to run on the date of service of the most recent amended complaint. Additionally, Defendants contend that Plaintiff waived any argument that was not raised in his first opposition.

A special motion to dismiss must be filed within sixty days after service of the complaint unless the period is extended by the court for good cause shown. *NRS 41.660(2).* From the plain language of the statute it is unclear whether the sixty days runs from the service of the original complaint or the most recent amended complaint. Also, it appears the Nevada Supreme Court has not addressed the issue. However, several California

courts interpreting the California anti-SLAPP statute have held that the sixty day period begins to run on the date of service of the most recent amended complaint. *See, Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F.Supp.2d 1127, 1129 (N.D. Cal. 1999); *Yu v. Signet Bank/Virginia*, 126 Cal. Rptr. 2d 516, 527-28 (Cal. App. 2002); *Lam v. Ngo*, 111 Cal. Rptr. 2d 582 (Cal. App. 2001). In *Globetrotter*, the court held that in the absence of any statutory language indicating that the sixty-day period runs from the filing of the original complaint, the statute meant that the sixty-day period began to run from the filing of the most recent amended complaint. 63 F.Supp.2d at 1129. Additionally, in *Yu*, the court held that even though the defendants could have raised the anti-SLAPP motion at the outset of the case there motion was nevertheless timely because the plaintiffs filed an amended complaint. 126 Cal. Rptr. 2d at 527-28.

The Court concludes that the sixty-day period begins to run on the service of the most recent amended complaint because the statute does not expressly state that the special motion to dismiss must be filed within sixty days of the original complaint. Further, even if the Defendants' Motion was untimely, the Court concludes that the Defendants' have shown good cause for an extension of the deadline. Accordingly, Plaintiff's Motion to Strike is denied.

Appendix B

DEFENDANTS' MOTION TO STRIKE VOLUNTARY DISMISSAL.

A plaintiff may dismiss an action at any time before service by the adverse party of an answer or a motion for summary judgment. *NRCP 41(a)(1).* Here, *NRS 41.660(3)(a)* requires the Court to treat the Special Motion as a motion for summary judgment. Thus, the Plaintiff lost the opportunity to unilaterally dismiss any cause of action after the Special Motion was served. Accordingly, Defendants' Motion to Strike is granted and Plaintiff's voluntary dismissal dated May 23, 2006, is hereby stricken.

IT IS SO ORDERED.

Dated this 20th day of July, 2006.

s/ David R. Gamble
DAVID R. GAMBLE
District Judge

No. 09-1021

In The Supreme Court of the United States

GREG JOHN,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT, a Political Subdivision of the State of Nevada; TOM MORGAN, an Individual; KATHERINE MILNER, an Individual; GARY DIEDRICH, an Individual; and MARTY SWISHER, an Individual,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Nevada

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Nevada Supreme Court affirmed the dismissal of federal claims brought by the petitioner in a Nevada district court. The dismissal was pursuant to application of Nevada's anti-SLAPP statute, which permits state courts to dismiss claims brought to punish or chill the speech of those who petition the government when the claims have no merit.

The question presented is:

Should this Court grant review to consider whether the Nevada Supreme Court properly affirmed dismissal of federal claims where:

(a) the Nevada Supreme Court decision does not conflict with any decision of this Court, the federal courts of appeals, or any other state court of last resort;

(b) the objection raised in the petition concerning statutory limitations on discovery was not raised, argued, or preserved below;

(c) federal legislation pending in the U.S. Congress would eliminate the argument that federal claims brought in federal court are not subject to a similar procedural statute; and

(d) the decision to grant respondents' special motion to dismiss was based on the merits, and the facts in petitioner's case could not support his claims under any procedure for review?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

A. Facts And Proceedings Below 1

B. The Nevada Anti-SLAPP Statute 5

SUMMARY OF ARGUMENT 7

REASONS FOR DENYING THE WRIT 9

A. The Nevada Supreme Court Decision Does Not Conflict With Any Decision Of This Court, The Federal Courts Of Appeals, Or Any Other State Court Of Last Resort 9

1. There Is No Conflict With Any Decision Of This Court 9

2. There Is No Conflict With Any Decision Of The Federal Courts Of Appeals 13

3. There Is No Conflict With Any Decision Of A State Court Of Last Resort 16

B. The Objection Raised In The Petition Concerning Statutory Limitations On Discovery Was Not Raised, Argued, Or Preserved Below 17

TABLE OF CONTENTS – Continued

Page

C. Federal Legislation Pending In The U.S. Congress Would Eliminate The Argument That Federal Claims Brought In Federal Court Are Not Subject To A Similar Procedural Statute 19

1. The *Noerr-Pennington* Doctrine Similarly Immunizes Defendants In § 1983 Litigation 20

2. The Citizen Participation Act Of 2009, If Passed, Will Provide Federal Anti-SLAPP Immunity 22

D. The Decision To Grant Respondents' Special Motion To Dismiss Was Based On The Merits, And The Facts In Petitioner's Case Could Not Support His Claims Under Any Procedure For Review 23

CONCLUSION 27

APPENDIX

Congressional Record Service (CRS) Summary of H.R. 4364 ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Ambus v. Granite Brd. of Ed., 995 F.2d 992 (10th Cir. 1993) 13, 14

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986) 13

Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937 (2009) 7

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955 (2009) 7

Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790 (1980) 10, 11

Boulware v. Nevada Dept. of Human Resources, 960 F.2d 793 (9th Cir. 1992) 21

Bradbury v. Superior Court, 49 Cal.App.4th 1108, 57 Cal.Rptr.2d 207 (Cal.App.2.Dist. 1996) 16

Celotex v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986) 13

Eastern R. Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523 (1961) 20

Empress L. [illegible] City and County of S.F., 419 F.3d 1052 (9th Cir. 2005) 21

Evers v. County of Custer, 745 F.2d 1196 (9th Cir. 1984) 21

Felder v. Casey, 487 U.S. 131, 108 S.Ct. 2302 (1988) 12, 13

TABLE OF AUTHORITIES – Continued

Page

Garcetti v. Ceballos, 547 U.S. 410, 126 S.Ct. 1951 (2006) 26

Goldberg v. Town of Rocky Hill, 973 F.2d 70 (2d Cir. 1992) 13, 14

Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430 (1990) 10, 11, 12

Kimes v. Stone, 84 F.3d 1121 (9th Cir. 1996) 14

Manistee Town Center v. City of Glendale, 227 F.3d 1090 (9th Cir. 2000) 22

Martinez v. California, 444 U.S. 277, 100 S.Ct. 553 (1980) 10

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986) 13

Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978) 10, 13

Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398 (1980) 10

United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965) 21

U.S. ex rel. Newsham v. Lockheed Missiles, 190 F.3d 963 (9th Cir. 1999) 15

Vergos v. McNeal, 146 Cal.App.4th 1387, 53 Cal.Rptr.3d 647 (Cal.App.3.Dist. 2007) 16

Webb v. Sloan, 330 F.3d 1158 (9th Cir. 2003) 13, 14

TABLE OF AUTHORITIES – Continued

Page

U.S. CONSTITUTION:

U.S. Const. Amend. 1 20

U.S. Const. art. VI, cl. 2 11

STATUTES:

NRS §§ 41.637 *et seq.* 2

NRS § 41.637.3 ..... 5, 6

NRS § 41.650 ..... 5, 6

NRS § 41.660.2 6

NRS § 41.660.3(a) 2, 3, 13, 17

NRS § 41.660.3(a)-(b) 17

NRS § 41.660.4 6

28 U.S.C. § 1257(a) 1

42 U.S.C. § 1983 ..... *passim*

RULES:

Federal Rules of Civil Procedure, Rule 8 15

Federal Rules of Civil Procedure, Rule 12 15

Federal Rules of Civil Procedure, Rule 56 15

Federal Rules of Civil Procedure, Rule 56(f) 18

Nevada Rules of Civil Procedure, Rule 56(c) 6

Nevada Rules of Civil Procedure, Rule 56(f) 18

United States Supreme Court, Rule 10 27

TABLE OF AUTHORITIES – Continued

Page

NEVADA LEGISLATIVE HISTORY:

1997 Nev. Stat., ch. 387, preamble, at 1364 5

PROPOSED LEGISLATION:

H.R. 4364 – Citizen Participation Act of 2009.....19, 22

OPINIONS BELOW

The opinion of the Nevada Supreme Court that is the subject of this petition is published at 219 P.3d 1276. See Pet. App. A.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

A. Facts And Proceedings Below.

This case arises out of an employment discrimination lawsuit. Petitioner Greg John was employed as a security guard for the Douglas County School District. An investigation into his misconduct was prompted after another security guard complained that petitioner engaged in unprofessional conduct when he improperly videotaped a special education student at the high school, created a loathsome, sexually explicit narration to accompany the videotape, and then invited coworkers to his office to show off his work. In the course of investigating this misconduct, another staff member complained she had been sexually harassed by petitioner. Following the investigation, petitioner was suspended. He appealed the suspension, the suspension was upheld, and he abandoned further grievance review.

He then filed an Equal Employment Opportunity Commission (EEOC) complaint, and an investigation was conducted. The EEOC issued a Dismissal and Notice of Rights letter stating it was unable to conclude that there was any statutory violation. After the EEOC dismissed his complaint, the petitioner filed a lawsuit in Nevada district court alleging violations of state and federal law. In his lawsuit, he named individuals who had participated in the investigations into his misconduct, as well as the school district. It was clear to the school district that petitioner intended to punish those who had participated in the school district investigation and discipline process by naming each of them as individual defendants in his lawsuit.

One year later, petitioner was fired after he refused to cooperate with the school district's investigation into allegations that he improperly obtained confidential student records. He amended his complaint to add the school principal as a defendant, and the school district filed a special motion to dismiss under Nevada's anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute. See Nevada Revised Statutes (NRS) §§ 41.637 *et seq*. A special motion to dismiss under the anti-SLAPP statute is treated as a motion for summary judgment. NRS § 41.660.3(a).

The district court provided petitioner with two separate opportunities to place into evidence any facts that would support his claims. His first opportunity was in his opposition to the special

motion to dismiss. In that opposition, the petitioner simply incorporated two paragraphs directly from his complaint as factual support for his claims. After reviewing respondents' motion, petitioner's opposition, and respondents' reply, the district court judge convened a hearing. After hearing the arguments of counsel, the court gave petitioner another opportunity to set forth facts in support of his claims in supplemental points and authorities in opposition to the special motion to dismiss. When the petitioner filed his supplemental points and authorities, he attached a five-page declaration setting forth the evidence to support his claims.

When the briefing was complete, the district court evaluated the special motion to dismiss under summary judgment standards, as required by the anti-SLAPP statute. NRS § 41.660.3(a). When the facts petitioner alleged did not create a genuine issue of material fact as to the probability of success on the merits, his claims were dismissed. Pet. App. B at 33a-34a.

Petitioner appealed the dismissal to the Nevada Supreme Court. Nevada does not have an intermediate appellate court, and customary procedure is for the court to appoint three-judge panels to hear and decide cases, with availability of a petition for rehearing *en banc*. In this instance, the Nevada court took a rare opportunity to hear this case *en banc*, and thereafter rendered a unanimous decision in favor of respondents.

In the Nevada Supreme Court appeal, petitioner raised two issues. First, he alleged that Nevada's anti-SLAPP statute did not apply to his federal causes of action. The Nevada Supreme Court disagreed, and held that Nevada's anti-SLAPP statute does apply to federal claims brought in state courts because "it is a neutral and procedural statute that does not undermine any federal interests." Pet. App. A at 3a.

The second issue petitioner raised was whether the district erred in dismissing his claims under the statute. Notably, petitioner was given three different opportunities by the Nevada Supreme Court to demonstrate that below he had established the existence of a genuine issue of material fact so as to preclude summary judgment. These opportunities were provided through his opening brief, his reply brief, and in a supplemental brief ordered by the court.

In a unanimous decision, the Nevada Supreme Court affirmed the dismissal for two reasons. The court first concluded that the communications by school district employees and the district regarding petitioner's conduct and the resulting investigations were protected under the anti-SLAPP statute. Under the anti-SLAPP statute, it was the petitioner's burden to demonstrate a genuine issue of material fact regarding his claims. The Nevada Supreme Court held that the petitioner failed to do so, and therefore his claims were properly dismissed by the trial court. Pet. App. A at 3a.

B. The Nevada Anti-SLAPP Statute

A SLAPP is a "meritless suit filed primarily to chill the defendant's exercise of First Amendment rights." Pet. App. A at 7a (citations omitted). The Nevada Legislature passed anti-SLAPP legislation in 1993 to provide a procedural mechanism for early dismissal of SLAPP lawsuits. The statute was amended in 1997, and at that time "the Legislature explained that SLAPP lawsuits abuse the judicial process by chilling, intimidating, and punishing individuals for their involvement in public affairs." Pet. App. A at 8a, citing 1997 Nev. Stat., ch. 387, preamble, at 1364. "The Legislature further reasoned that the number of SLAPP lawsuits in Nevada had increased, and therefore, implementation of an anti-SLAPP statute was essential to protect citizens' constitutional rights." *Id.*

Nevada's anti-SLAPP statute provides that "[a] person who engages in good faith communication in furtherance of the right to petition is immune from civil liability for claims based upon the communication." NRS § 41.650. Good faith communications in furtherance of the right to petition include any "written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law, which is truthful or made without knowledge of its falsehood." NRS § 41.637.3. Such communications include the kinds of communications necessary for investigating and reporting workplace misconduct.

If an action is brought against a person, business or organization based upon good faith communications in furtherance of the right to petition, a defendant may file a special motion to dismiss within 60 days after service of a complaint. NRS § 41.660.2. In the special motion, "the moving party must first make a threshold showing that the lawsuit is based on good faith communications made in furtherance of the right to petition the government." Pet. App. A at 11a. NRS § 41.650. If that showing is made, "then the burden of production shifts to the nonmoving party, who must demonstrate a genuine issue of material fact." *Id.* If the nonmoving party does not carry its burden to demonstrate a genuine issue of material fact, the motion to dismiss will be granted. "[T]he dismissal operates as an adjudication upon the merits." *Id.*, citing NRS § 41.660.3-4 and Nevada Rules of Civil Procedure, Rule 56(c).

As the Nevada Supreme Court pointed out, "Nevada's anti-SLAPP statute is not an absolute bar against federal substantive claims; rather, it bars claims from persons who seek to abuse other citizens' rights to petition their government, and it allows meritorious claims against citizens who do not petition the government in good faith." Pet. App. A at 9a.

SUMMARY OF ARGUMENT

In its unanimous *en banc* decision, the Nevada Supreme Court held that Nevada's anti-SLAPP statute can be applied to federal claims brought in state courts. The court also affirmed the decision of the district court below that because the petitioner did not show a genuine issue of material fact, dismissal of his federal claims was proper as a matter of law.

Throughout this case, the petitioner has erroneously sought to cast the anti-SLAPP statute as an impermissible immunity. In fact, the statute does not operate as an immunity at all. It is nothing more than a procedural mechanism for early dismissal of unworthy lawsuits, and it operates in a fashion almost identical to a motion for summary judgment. It does not close the courthouse door to any particular litigants or kinds of claims, nor does it add or subtract elements from an existing cause of action. It does not impose an increased burden of proof or an unwieldy procedure. Petitioner's argument that the statute creates an immunity that undermines important federal interests has been unpersuasive and remains so.

This Court has clearly signaled that procedural rules giving courts an opportunity for prompt review of meritless claims are not disfavored. Recently, the Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2009), and *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937 (2009), suggest

there is nothing at all improper about a procedural mechanism which allows a federal court to test the merits of a case at the earliest opportunity.

In his petition, petitioner contends that a federal claim brought in a Nevada state court cannot be subject to the state anti-SLAPP statute. For four reasons, the question presented by the petition does not warrant further review by this Court.

First, the petitioner has failed to document any conflict between or among the decision of the Nevada Supreme Court and this Court, the federal courts of appeals, or the state courts of last resort. *Second,* petitioner for the first time in this case has raised an objection to the statutory limitations on discovery in Nevada's anti-SLAPP statute. This objection, framed as a burden on federal interests, was never raised, argued, or preserved below, and thus is not properly before this Court. *Third,* legislation pending in the U.S. Congress, if passed, will provide an anti-SLAPP procedure in the federal courts, eliminating the argument that no federal claim in a federal court would ever be subject to this procedure. Also, under the *Noerr-Pennington* doctrine, federal claims are already subject to a similar early dismissal. *Fourth,* petitioner's claims were ultimately dismissed because he simply had no facts to prove the alleged violations of federal law. Thus, even if the case is remanded for review under another procedural mechanism, the outcome will be the same.

For any of these reasons, petitioner's case does not warrant this Court's attention and the petition should be denied.

REASONS FOR DENYING THE WRIT

A. The Nevada Supreme Court Decision Does Not Conflict With Any Decision Of This Court, The Federal Courts Of Appeals, Or Any Other State Court Of Last Resort.

In a futile attempt to demonstrate conflict worthy of this Court's attention, petitioner has cited a number of cases where federal courts did not apply state statutes that immunized particular defendants based on their status, or immunized defendants against certain kinds of claims, or served absolutely to bar access to the courts. These cases do not support petitioner's aim to show conflict, because unlike Nevada's anti-SLAPP statute, these cases deal with immunities that bar claims without regard to the merits of the claims. For this reason, not one of the cases cited by petitioner demonstrates conflict with the decision of the Nevada Supreme Court.

1. There Is No Conflict With Any Decision Of This Court.

Petitioner states that the Nevada Supreme Court has decided "an important federal question in a way that conflicts with relevant decisions of this Court."

Pet. at 5. However, there is no conflict with any of the decisions cited by petitioner.

To begin, there is no conflict with this Court's decision in *Howlett v. Rose*. In *Howlett v. Rose,* 496 U.S. 356, 110 S.Ct. 2430 (1990), the U.S. Supreme Court held that a state's sovereign immunity law protecting municipalities from federal suit under 42 U.S.C. § 1983 was ineffective in light of the Court's ruling in *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018 (1978), holding that municipal corporations are "persons" subject to § 1983 suit.

Nevada's anti-SLAPP statute differs significantly from a sovereign immunity statute because it does not bar all claims. It dismisses claims that are demonstrably without merit. See discussion *infra*. Thus, there is no conflict with *Howlett* based on an argument that the anti-SLAPP immunizes any entity from suit under § 1983. For the same reason, there is no conflict with this Court's decisions in *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398 (1980) (holding municipality has no immunity from liability under § 1983), or *Martinez v. California,* 444 U.S. 277, 100 S.Ct. 553 (1980) (holding public employees have no absolute immunity from liability under § 1983). Petitioner's reference to *Board of Regents v. Tomanio,* 446 U.S. 478, 100 S.Ct. 1790 (1980) undercuts his arguments, since in that case this Court upheld application of the New York statute of limitation and the New York rule for tolling that statute, resulting in a dismissal of the respondent's

§ 1983 claims. The decision and analysis in *Tomanio* is certainly not in conflict with the decision of the Nevada Supreme Court.

There is also no conflict with the *Howlett* Court's analysis of the applicability of state procedural rules to federal claims in state courts. To the contrary, the Nevada Supreme Court relied substantially on *Howlett* for its determination that "Nevada's anti-SLAPP statute is a neutral procedural statute" (Pet. App. A at 19a), which does not create a "substantive cause of action or defense." Pet. App. A at 18a. "Instead," the court explained, "like rules of civil procedure, the statutes create a procedural mechanism to prevent wasteful and abusive litigation by requiring the plaintiff to make an initial showing of merit." *Id.*

The authority of state courts to decide federal claims arises from the federal Supremacy Clause, U.S. Const. art. VI, cl. 2, which "charges state courts with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure." *Howlett,* 496 U.S. at 367, 110 S.Ct. 2430. "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." *Howlett,* 496 U.S. at 372, 110 S.Ct. 2430 (internal quotes deleted).

The *Howlett* Court explained that "a State may adopt neutral procedural rules to discourage frivolous litigation of all kinds, as long as those rules are not preempted by valid federal law. A State may not,

however, relieve congestion in its courts by declaring a whole category of federal claims to be frivolous." *Howlett,* 496 U.S. at 380, 110 S.Ct. 2430. The Nevada anti-SLAPP statute has not declared a whole category of federal claims to be frivolous. Instead, the statute provides Nevada's courts with a procedural rule to determine whether suits are meritorious. "The adequate-state-ground doctrine accords respect to state courts as decision-makers by honoring their modes of procedure." *Howlett,* 496 U.S. at 370, 110 S.Ct. 2430.

The Nevada Supreme Court, relying on *Howlett,* concluded that Nevada's neutral anti-SLAPP statute, enacted to prevent an abuse of the judicial process through groundless civil actions, may be applied to federal claims in state courts. Pet. App. A at 3a. There is no conflict with this Court's decision in *Howlett.*

Petitioner also alleges that the Nevada Supreme Court's failure to consider the underlying rationale in *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302 (1988), requires reversal of the decision below. Pet. at 3. Respondents disagree.

The kinds of procedural rules in state courts that offend *Felder* are those which predictably produce different outcomes in § 1983 litigation based solely on whether the claims were brought in state or federal court. Because Nevada's anti-SLAPP statute requires that claims only be dismissed if a plaintiff fails to create a genuine issue of material fact, the statute does not predictably produce different outcomes.

The anti-SLAPP statute specifically requires that claims be evaluated on their merits according to summary judgment standards. NRS § 41.660.3(a). Those standards derive from this Court's seminal decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986); *Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); and *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). Thus, under the anti-SLAPP statute, claims are judged on their merits, and nothing about the application of Nevada's anti-SLAPP statute to federal claims conflicts with this Court's decision in *Felder*.

2. There Is No Conflict With Any Decision Of The Federal Courts Of Appeals.

Petitioner contends that the Nevada Supreme Court decision conflicts with decisions of the United States courts of appeals. However, there is no conflict with any of the decisions cited by petitioner.

As evidence of conflict with federal court decisions, petitioner has cited a string of cases which simply establish that one kind of state law immunity – sovereign immunity for municipalities – cannot be applied by state or federal courts after this Court's decision in *Monell* to immunize cities, school boards, and other local government entities from suit in § 1983 actions. See *Webb v. Sloan*, 330 F.3d 1158 (9th Cir. 2003); *Ambus v. Granite Brd. of Ed.*, 995 F.2d 992 (10th Cir. 1993); and *Goldberg v. Town of Rocky Hill*,

973 F.2d 70 (2d Cir. 1992). Petitioner has also cited *Kimes v. Stone*, 84 F.3d 1121 (9th Cir. 1996) where the court held that a state law "litigation privilege" which absolutely immunized attorneys participating in judicial proceedings from tort liability could not be applied to § 1983 actions. There is no conflict between the *Kimes* decision and the Nevada Supreme Court because the anti-SLAPP statute does not immunize any defendants from liability so long as the underlying claims have merit.

The cases cited by petitioner do not conflict with the decision of the Nevada Supreme Court. The court observed that "While it is true that state sovereign immunity is not a defense to a § 1983 claim, there is a significant difference between state sovereign immunity and Nevada's anti-SLAPP statute." Pet. App. A at 13a. The court further explained:

> Nevada's anti-SLAPP statute, however, is not an absolute bar to liability. Whereas immunity would bar all claims including meritorious claims, Nevada's anti-SLAPP statute differs as it permits cases to proceed to discovery and trial after a nonmoving party makes an initial demonstration of merit.

Id. Because Nevada's anti-SLAPP statute does not function similarly to a sovereign immunity or any other rule which bars particular claims or immunizes particular defendants, as opposed to dismissing claims on the merits, there is no conflict with *Webb*, *Ambus*, *Goldberg*, or *Kimes*.

In *U.S. ex rel. Newsham v. Lockheed Missiles*, 190 F.3d 963, 973 (9th Cir. 1999) the federal court analyzed California's anti-SLAPP statute and concluded that the statute was properly applied to the state law counterclaims in the federal court. In fact, the Nevada Supreme Court cited *Lockheed* for its recognition that "both California's anti-SLAPP statute and the Federal Rules of Civil Procedure 'serve similar purposes, namely the expeditious weeding out of meritless claims before trial.'" Pet. App. A at 19a, citing *Lockheed*, 190 F.3d at 972.

Importantly, the *Lockheed* court held that application of the statute would not result in any "direct collision" with a Federal Rules of Civil Procedure Rule 12 motion to dismiss or a Rule 56 motion for summary judgment. *Lockheed* at 972. The court further explained that "there is no indication that Rules 8, 12, and 56 were intended to occupy the field with respect to pretrial procedures aimed at weeding out meritless claims." *Id.* The *Lockheed* court did not rule that state anti-SLAPP procedures could not be applied to federal claims in state courts, because that issue was not before the court. This case does not conflict with the decision of the Nevada Supreme Court, and its reasoning supports that decision.

3. There Is No Conflict With Any Decision Of A State Court Of Last Resort.

There are no other decisions in the state courts of last resort which address the question presented by petitioner, so no conflicts have arisen among the states which would suggest a compelling need for review by this Court.

The decision of the Nevada Supreme Court does align with lower state court decisions. For example, the California Court of Appeal has held that California's anti-SLAPP statute may be applied to federal claims brought in state courts. In *Bradbury v. Superior Court,* 49 Cal.App.4th 1108, 57 Cal.Rptr.2d 207 (Cal.App.2.Dist. 1996), the plaintiff brought § 1983 claims in a state court, and argued that California's anti-SLAPP statute did not apply to his claims because the anti-SLAPP statute "violates federal substantive law." *Bradbury*, 57 Cal.Rptr.2d at 213. The California Court of Appeal disagreed, holding that "where the action is founded on a federal statute and brought in state court, state procedure controls unless the federal statute provides otherwise." *Id.* (citations omitted).

See also *Vergos v. McNeal,* 146 Cal.App.4th 1387, 53 Cal.Rptr.3d 647 (Cal.App.3.Dist. 2007), where the California Court of Appeal reaffirmed that "Federal civil rights claims brought in California are subject to section 425.16 [California's anti-SLAPP statute] motions." *Vergos* at 651, citing *Bradbury* at 213. In this matter, the California Court of Appeal concluded

that the anti-SLAPP statute applied to the § 1983 claims and granted the motion after finding that the plaintiff had no evidence that McNeal violated his civil rights.

Because there is no conflict with decisions of this Court, the federal courts of appeals, or any other state court of last resort, this matter does not merit review and the petition should be denied.

B. The Objection Raised In The Petition Concerning Statutory Limitations On Discovery Was Not Raised, Argued, Or Preserved Below.

The *second* reason for refusing to grant the petition is that petitioner's objection to Nevada's anti-SLAPP statute concerning the statutory limitations on discovery was not raised, argued, or preserved below.

Nevada's anti-SLAPP statute states that if a special motion to dismiss is filed, the court shall "(a) treat the motion as a motion for summary judgment; [and] (b) stay discovery pending: (1) a ruling by the court on the motion; and (2) the disposition of any appeal from the ruling on the motion." NRS § 41.660.3(a)-(b). The Nevada Rules of Civil Procedure contain a provision paralleled in the Federal Rules of Civil Procedure which allows a court to permit limited discovery when a motion for summary judgment is pending. Such a request for limited discovery could have been made by petitioner in the

case below. See Nevada Rules of Civil Procedure, Rule 56(f) and Federal Rules of Civil Procedure, Rule 56(f). Petitioner never made such a request.

In his summary of argument, the petitioner complains *for the first time* that it is the anti-SLAPP statutory limitation on discovery that burdens federal rights. In this regard, he alleges:

> The anti-SLAPP statute must be invoked without any opportunity for the usual discovery that would be available in federal court before a dispositive motion on immunity is considered. The federal civil rights plaintiff in a Nevada state court must thus be able to create a genuine issue of material fact on his claims at the outset, and must do so with no discovery, or his or her federal claims will be dismissed. This greatly impedes the federal civil rights plaintiff in Nevada state court, and thwarts congressional intent that these claims be adjudicated on their merits absent the applicability of some *federal* immunity.

Pet. at 2 (emphasis in original).

Later, petitioner repeats this objection:

> But [the anti-SLAPP statute] does more than just provide expressly for an "immunity" (contrary to the Nevada Supreme Court's reading of the law as not providing an immunity). It forecloses discovery on the federal claim and requires a federal claim plaintiff to demonstrate a genuine issue of

> material fact before any discovery can ever take place.

Pet. at 3-4.

If, as petitioner suggests, the statutory limitation on discovery posed the most significant threat to federal claims, then he should have raised this issue below. However, petitioner's objection to the discovery limitations was never raised, argued, or decided below. Because the petitioner never requested an opportunity for discovery, he was never denied an opportunity for discovery. Consequently, the Nevada Supreme Court decision contains no discussion of this issue and no rulings which are available for review by this Court.

Because the record below contains no facts, legal analysis, or conclusions of law on this issue, the petition should be denied for failure to preserve the issue below.

C. Federal Legislation Pending In The U.S. Congress Would Eliminate The Argument That Federal Claims Brought In Federal Court Are Not Subject To A Similar Procedural Statute.

The *third* reason for denying the petition is that the U.S. Congress presently has before it H.R. 4364, the Citizen Participation Act of 2009, which if passed will create a federal anti-SLAPP statute. And even if this bill does not become law, the federal courts have long imposed a similar immunity under the *Noerr-Pennington* doctrine.

Respondents begin with a discussion of the *Noerr-Pennington* doctrine, and then discuss the pending federal legislation.

1. The *Noerr-Pennington* Doctrine Similarly Immunizes Defendants In § 1983 Litigation.

Petitioner claims that Nevada's "anti-SLAPP statute, applied to federal claims, immunizes respondents from liability in a way that could never occur in federal court." Pet. at 2. Later, petitioner alleges that the statute "thwarts a congressional remedy by placing a burden on the exercise of a federal right by forcing victims who seek § 1983 redress in state courts to comply with a requirement that is absent from § 1983 litigation in federal courts." Pet. at 4. Neither of these representations is accurate, because the federal *Noerr-Pennington* doctrine provides similar immunities for defendants in § 1983 litigation brought in federal court.

The *Noerr-Pennington* doctrine derives from the First Amendment's guarantee of "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. Amend. 1. Under the *Noerr-Pennington* doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct. *Eastern R. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961);

United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965).

The clearest evidence that § 1983 claims are not impermissibly burdened by state anti-SLAPP statutes is provided in the line of federal court cases that apply *Noerr-Pennington* immunity to a variety of defendants (including individuals and government entities) in § 1983 claims related to the defendants' lobbying or petitioning of public authorities. See, e.g., *Manistee Town Center v. City of Glendale,* 227 F.3d 1090 (9th Cir. 2000), where a shopping center brought a § 1983 action alleging that the city's lobbying of the county not to enter into a lease with it deprived the shopping center of property without due process of law. The federal district court dismissed the shopping center's claims on the ground that the city's actions were immunized under the *Noerr-Pennington* doctrine. The Ninth Circuit affirmed the dismissal. See also *Boulware v. Nevada Dept. of Human Resources,* 960 F.2d 793, 800 (9th Cir. 1992); *Evers v. County of Custer,* 745 F.2d 1196, 1204 (9th Cir. 1984); *Empress LLC v. City and County of S.F.,* 419 F.3d 1052, 1056 (9th Cir. 2005).

In its decision, the Nevada Supreme Court commented favorably on the similarity of purpose between Nevada's anti-SLAPP statute and the *Noerr-Pennington* immunity doctrine, noting that "The basis of this doctrine is that representative democracy demands that citizens and public officials have the ability to openly engage in discussions of public

concern." Pet. App. A at 9a, citing *Manistee Town Center,* 227 F.3d at 1093.

The *Noerr-Pennington* doctrine is frequently applied in federal courts to § 1983 claims, countering petitioner's argument that federal claims in federal courts are not subject to similar treatment. Thus, this argument merits no review.

2. The Citizen Participation Act Of 2009, If Passed, Will Provide Federal Anti-SLAPP Immunity.

H.R. 4364, the Citizen Participation Act of 2009, was introduced in the U.S. Congress on December 15, 2009. The official Congressional Research Service (CRS) summary of the proposed legislation is attached in the Appendix.

According to the bill, the goal of H.R. 4364 is to protect the constitutional rights of petition and free speech by creating immunity from and procedures to dismiss and deter SLAPPs brought in the federal courts. Petition activity includes statements made before or submitted to a government body or activity encouraging others to make or submit such statements.

The legislation proposes a set of procedural mechanisms that are very similar to the procedures in Nevada's anti-SLAPP statute. The proposed Act allows a defendant to bring a special motion to dismiss the lawsuit within 45 days. The defendant first shows that the lawsuit arose from protected speech or

petition activity; the plaintiff must then demonstrate that the claim is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment. If the plaintiff cannot meet this burden, the lawsuit is dismissed. The hearing and the ruling on the motion are expedited, and discovery proceedings are stayed until the motion is resolved. The court for good cause may order that specified discovery be conducted.

If this proposed legislation becomes law, then the question of whether federal claims are impermissibly subject to state anti-SLAPP statutes will be settled. For this reason, the decision of the Nevada Supreme Court that a federal claim brought in state court is subject to the procedures in the state's anti-SLAPP statute does not merit this Court's review, and the petition should be denied.

D. The Decision To Grant Respondents' Special Motion To Dismiss Was Based On The Merits, And The Facts In Petitioner's Case Could Not Support His Claims Under Any Procedure For Review.

In the closing paragraph of his Argument, petitioner requests that the Court grant the petition, reverse the Nevada Supreme Court decision, and remand the case for further proceedings absent the application of the anti-SLAPP statute. Pet. at 7. The *fourth* reason this Court should not grant the petition is because the ultimate decision to dismiss petitioner's

claims was based on the merits, and the facts in his case would not support his claims even if the anti-SLAPP statute were not applied. Under any procedural rule for adjudicating the merits of petitioner's claims, the claims will fail for lack of evidence.

Once the Nevada Supreme Court determined the anti-SLAPP could be applied to petitioner's federal claims for discrimination based on religion and disability, and for violations of his First Amendment rights, the court reviewed the substantive decision made below. Because petitioner produced no facts to prove his claims, the claims were dismissed. Pet. App. A at 3a. His position has been, and continues to be, that he was never obligated to show a genuine issue of material fact because the statute was preempted by federal law. Pet. at 7. Petitioner says that for this reason he "could have stood mute, declining to try to demonstrate a genuine issue of material fact." *Id.*

If he had stood mute, this strategy could have been seen as the noble effort of the litigant refusing to play a game whose rules he believes do not apply to him. And that is exactly how he wants this Court to interpret his inability to provide the Nevada district court with the facts necessary to survive a motion for summary judgment – even after he was given a supplementary opportunity to do so. To reinforce this interpretation, he states: "For purposes of this Petition, this Court should assume that is what occurred, as petitioner's position is that he did not have to show a genuine issue of material fact under a statute that is preempted by federal law." Pet. at 7.

The problem with this argument is that it is not what occurred in this case. The petitioner did not "decline to try" – he did try, and he failed. He did not stand mute. He put the facts that he had before the district court. Those facts were simply insufficient to create a genuine issue of material fact, and that is why his claims were dismissed. Moreover, as pointed out above, he never once in any pleading blamed the anti-SLAPP statute's limitation on discovery for his failure to put the necessary facts before the district court.

In this regard, the Nevada Supreme Court found:

1. Petitioner claimed religious-based discrimination, but the school district submitted evidence that it was not aware of petitioner's religious beliefs. "In response, John failed to provide any evidence of religious discrimination other than his own general allegations in his pleadings." Pet. App. A at 20a.

2. Petitioner claimed disability-based discrimination based on his alcoholism, but he "failed to provide any documentation supporting his claimed disability or adverse employment treatment." Pet. App. A at 20a. "Further, when responding to John's EEOC complaint, the DCSD stated that it did not know of John's alcoholism, and he never sought accommodation for any disability." *Id.*

3. Petitioner also alleged violations of his First Amendment right of free speech. After the school district discovered his inappropriate and offensive use of school surveillance equipment, his access to video

equipment was removed and he objected. Pet. App. A at 20a-21a. The Nevada Supreme Court observed that at its hearing on the appeal, petitioner failed to rebut the district's argument that under *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006), his objections to the removal of his surveillance duties are not protected communications. Pet. App. A at 21a. As the court pointed out, under *Garcetti,* "when a public employee is not speaking as a citizen on a matter of public concern, then the employee has no First Amendment cause of action against the employer for its reaction to the speech." Pet. App. A at 21a, citing *Garcetti,* 547 U.S. at 418.

Based on the law in light of these undisputed facts, the court properly affirmed the district court's dismissal of petitioner's religious discrimination, disability discrimination, and First Amendment claims.

The Nevada Supreme Court made absolutely clear that petitioner's failure to rebut respondents' facts "does not mean Nevada's anti-SLAPP statute undermined or frustrated any federal substantive claims. On the contrary, John could have proceeded with his federal substantive claims had he shown a genuine issue of material fact." Pet. App. A at 22a. The court further clarified: "In other words, Nevada's neutral and procedural anti-SLAPP statute neither undermines nor frustrates John's federal substantive claims." *Id.* Nothing stood in the way of petitioner's claims going forward except their own unworthiness.

In the end, judicial disposition of this case, whether decided based on a special motion to dismiss under Nevada's anti-SLAPP statute, or under any other procedural motion to dismiss or motion for summary judgment, would produce the same result. The claims would be dismissed for lack of evidence – as they should be.

For this reason, even if the Court found a compelling reason to review the issue, it is unlikely there would be an impact on the ultimate disposition of the case. Therefore, this particular case does not present an appropriate vehicle for resolution of the question petitioner has presented for review.

CONCLUSION

Petitioner has failed to provide compelling reasons for this Court to grant the writ. The petition does not meet the standard for certiorari under United States Supreme Court Rule 10 and should be denied.

Respectfully submitted,

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APPENDIX

Congressional Record Service (CRS) Summary of H.R. 4364

Title: Citizen Participation Act of 2009
Sponsor: Rep Cohen, Steve [TN-9] (introduced 12/16/2009) Cosponsors (1)
Latest Major Action: 12/16/2009 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

SUMMARY AS OF:
12/16/2009 – Introduced.

Citizen Participation Act of 2009 – Declares that Strategic Lawsuits Against Public Participation (SLAPPs), filed against thousands of individuals, organizations, and businesses based upon their valid exercise of the rights to petition or free speech, are an abuse of the judicial process that waste judicial resources and clog the already over-burdened court dockets.

Declares immune from civil liability any act of petitioning the government made without knowledge of falsity or reckless disregard of falsity. Requires a plaintiff (especially in a SLAPP) to prove knowledge of falsity or reckless disregard of falsity by clear and convincing evidence.

Provides that any act in futherance [sic] of the constitutional right of petition or free speech shall be entitled to the procedural protections provided in this Act.

Allows a party to file a special motion to dismiss any claim arising from an act or alleged act in furtherance of the constitutional right of petition or free speech within 45 days after service of the claim if the claim was filed in federal court or, if the claim was removed to federal court pursuant to this Act, within 15 days after removal.

Exempts from this Act: (1) certain procedural protections in any action brought solely on behalf of the public or solely to enforce an important right affecting the public interest; and (2) certain claims for relief involving commercial speech.